

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

75-7121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

MIRIAM WINTERS,

Plaintiff-Appellant,

-against-

ALAN D. MILLER, M.D., individually and as
Commissioner of Mental Hygiene of the State
of New York; ALEXANDER THOMAS, M.D., in-
dividually and as Director of Psychiatric
Division, Bellevue Hospital Center, FRANCIS
J. O'NEILL, M.D., individually and as Dire-
ctor of Central Islip State Hospital; Doctors
H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT,
GERALD GRANT, GERALD OLLINS, CHRISTINE JORDAN,
THOMAS DACORTA and CATHERINE DROMGOOLE, and
other doctors on the staffs of Bellevue Hospital
and Central Islip State Hospital whose names
are unknown to plaintiff,

Defendants-Appellees.

-----X

JOINT SUPPLEMENTAL APPENDIX

Bruce Ennis,
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Jonathan A. Weiss
Phillip Gassel
Legal Services for the Elderly
Poor
2095 Broadway
New York, New York 10023

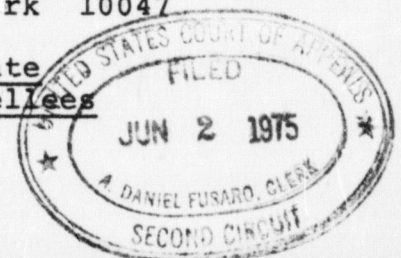
Attorneys for Plaintiff-Appellant

W. Bernard Richland
Corporation Counsel
Municipal Building
New York, New York 10007

LOUIS J. LEFKOWITZ
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State of New York
Two World Trade Center
New York, New York 10047

Attorney for Defendants-
Appellees Thomas & Ollins

Attorney for State
Defendants-Appellees



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Transcript of Record of Proceedings
of November 4, 1974

1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 MIRIAM WINTERS, on behalf of herself and :
5 all others similarly situated, :

6 Plaintiff, :

7 -against- :

69 Civ. 783

8 ALAN D. MILLER, M.D., individually and as :
9 Commissioner of Mental Hygiene of the :
10 State of New York; ALEXANDER THOMAS, M.D., :
11 individually and as Director of the :
12 Psychiatric Division, Bellevue Hospital :
13 Center; FRANCIS J. O'NEILL, M.D., indivi- :
14 dually and as Director of Central Islip :
15 State Hospital; DRS. H. BLANKFELD, DUSAN :
16 KOSOVIC, SANDRA GRANT, GERALD OLLINS, :
17 CHRISTINE JORDAN, THOMAS DaCORTA and :
18 CATHERINE DROMGOOLE, and other doctors on :
19 the staff of Bellevue Hospital and Central :
20 Islip Hospital whose names are unknown to :
21 Plaintiff, :

22 Defendants. :

23 -----x
24 United States Court House
25 Brooklyn, New York

November 4, 1974
10:00 o'clock a.m.

Before:

HONORABLE ORRIN G. JUD, U. S. D. J.

DANIEL D. SIMON
OFFICIAL COURT REPORTER

A p p e a r a n c e s :

GEORGE H. WEILER, ESQ.,
Deputy Assistant Corporation Counsel,
representing Dr. Alexander Thomas and another,
Municipal Building,
Brooklyn, New York.

* * * *

1 THE CLERK: Winters against Miller.

2 THE COURT: Anyone here for the plaintiff?

3 MR. WEILER: Mr. Weiss -- I can give your
4 Honor some information. It is this, that Mr. Weiss
5 called me Friday. I called him back and he told me
6 in view of the fact that depositions were not yet
7 returned, either side that was, either the plaintiff
8 or the State Attorney General, that he had asked to
9 put the case over. It was not necessary for me to
10 appear. But I saw in today's Law Journal it was
11 still on the calendar, so I came over.

12 I was surprised to hear that evidently there
13 had been some failure in communication by the attorney
14 for the plaintiff, and your chambers had not been
15 notified.

16 To give your Honor a capsule of the case as it
17 now exists, on September 20th, after four adjournments,
18 Mrs. Winters was deposed at her hotel room in the
19 Hotel St. George. The State Attorney General had
20 the reporter.

21 At that time, September 20th, everybody ap-
22 peared and Mrs. Winters was deposed. And her attor-
23 ney, Mr. Ennis and Mr. Weiss, were both there.

24 That, I understand, has not yet been transcribed
25 by the Attorney General's hired outside reporter.

1 On October 10th, the Director of Central Islip
2 State Hospital was deposed at the instance of the
3 plaintiff. I wasn't at that.

4 On the 13th and 14th, Dr. Thomas and Dr.
5 Miller, in order, Dr. Thomas being the Director of
6 Psychiatric Services at Bellevue, he was deposed, and
7 I was present, of course.

8 On the next day, Commissioner Miller, the
9 Commissioner of Mental Hygiene of the State of New
10 York, was deposed at the instance of the plaintiff at
11 the World Trade Center, which is the office of the
12 Attorney General. And I was present at that.

13 I understand that none of those transcripts
14 which were taken at the instance of the plaintiff
15 have yet been transcribed.

16 Mrs. Winters -- Mr. Weiss tells me that that
17 is necessary, that he had the transcript of the
18 various doctors.

19 Now, I have only one problem in the event that
20 your Honor grants adjournment --

21 THE COURT: I am not going to adjourn it.
22 I am going to dismiss it. Apparently there was some
23 effort to communicate here but nobody told me the case
24 wasn't ready, and I have a jury ready to try it.
25

5
1 There being no appearance for the plaintiff, and it
2 being a five-year-old case, the case will be dis-
3 missed --

4 MR. WEILER: I do not want to appear for
5 Mr. Weiss and Mr. Ennis, who have well stocked
6 offices --

7 THE COURT: They have a year to make a motion
8 to reinstate.

9 MR. WEILER: Fine.

10 THE COURT: All right.

11 MR. WEILER: Thank you. Since there is such
12 an opportunity offered to them, I know they would
13 want me to have asked for that.

14 I am sorry this has happened. I will com-
15 municate with them.

16 * * * *

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 -----X
5 MIRIAM WINTERS, on behalf of herself and :
6 all others similarly situated, :

7 Plaintiff, :

8 -against- : Civ. 69-783

9 ALAN D. MILLER, M.D., individually and as :
10 Commissioner of Mental Hygiene of the :
11 State of New York; ALEXANDER THOMAS, M.D., :
12 individually and as Director of the :
13 Psychiatric Division, Bellevue Hospital :
14 Center; FRANCIS J. O'NEILL, M.D., :
15 individually and as Director of Central :
16 Islip State Hospital; DRS. H. BLANKFELD, :
17 DUSAN KOSOVIC, SANDRA GRANT, GERALD :
18 OLLINS, CHRISTINE JORDAN, THOMAS CACORTA :
19 and the staff of Vellevue Hospital and :
20 Central Islip Hospital whose names are :
21 unknown to Plaintiff, :

22 Defendants. :
23 -----X

24 United States Courthouse
25 Brooklyn, New York
November 4, 1974
2:00 o'clock P.M.

26 B e f o r e :

27 HONORABLE ORRIN G. JUDD, U.S.D.J.

28 HENRY LEGENDRE
29 COURT REPORTER

Appearances:

GEORGE H. WEILER, ESQ.
Deputy Assistant Corporation Counsel
Attorney for Dr. Alexander Thomas and another
Municipal Building
Brooklyn, New York

JONATHAN WEISS, ESQ.
LEGAL SERVICES FOR THE ELDERLY POOR

BRUCE ENNIS, ESQ.
NEW YORK CIVIL LIBERTIES UNION
-and-
KANTOR & KANTOR, ESQS.
BY: STANLEY KANTOR, ESQ. .
Of Counsel

1
2 THE COURT: I think you were here this morning,
3 you heard Mr. Weiler's explanation that depositions were
4 not completed. I said I would dismiss it subject to
5 your right under Rule 60 to re-open it. If you are
6 ready to try it now I'll hear you on an oral motion
7 to re-open it.

8 MR. WEISS: I am ready to move to re-open it.

9 THE COURT: Tell me what is involved.
10 As I understand, at least the first \$25,000 that you
11 recover from any city defendant would go back to the
12 City as welfare payments, and if you get money from
13 the state employees, wouldn't that also go to the City?

14 MR. WEISS: Your Honor, my own legal position
15 is that such an attempt to recover that money could be
16 resisted, and there are ways --

17 THE COURT: Do you have any cases on that?

18 MR. WEISS: I have a series of Law Review
19 articles -- there is a case that seems to say that
20 you could recover it. There are a number of trust
21 instruments that have been established which allow
22 payment into a trust fund which would be safe from a
23 lien by the City. I myself have established such
24 trust funds in other cases of welfare recipients, so
25 I believe that it would be actually of benefit to her.

1
2 Among ideas, your Honor, that I have thought of,
3 your Honor, are the following:

4 Under the supplement security income you are
5 entitled to have for property, like a house and still
6 be on that program. One possible way of making the
7 award would be in fact to use the funds to purchase
8 condominiums or a house valued less than \$25,000
9 and therefore she would have a place rent free and
10 still live on supplemental income. I have a number of
11 ideas, discussed it with my client. I feel as an
12 attorney I could do a job that she could achieve the
13 results that she wanted. This is not an academic
14 matter.

15 THE COURT: I am prepared to pick a jury and
16 go to trial this afternoon.

17 MR. WEISS: I am not. My client is not. I
18 believe the opposing side is not. I believe the
19 denial of due process, if you were to force people to
20 go ahead without the depositions based on cross-
21 examination of the record.

22 Moreover, I believe you would be violating the
23 Sixth Amendment of the Constitution, which I am
24 willing to state that I'm not prepared to try the
25 case at this moment and my client has under the Sixth

Amendment a constitutional right to effective counsel. If I were to proceed now I would be ineffective counsel and you also would deny her of her constitutional rights.

THE COURT: You could apply on papers showing merit including your right to keep the recovery free of the welfare lien.

MR. WEISS: The merits have been stated by the Second Circuit.

THE COURT: They do not go into the effect of the City's lien.

MR. WEISS: The effect of the City's lien you would deal with when and if we recover.

MR. WEISS: Are you directing me to file further papers?

THE COURT: I've signed an order dismissing the case.

MR. WEISS: I can't speak for my co-counsel. Maybe they will stipulate to re-open it.

THE COURT: I am not going to take a stipulation to re-open a five-year-old case where counsel knew five months ahead that it was on the calendar and failed to be here this morning.

MR. WEISS: Your Honor, as far as my failing to be here this morning, I believe it was not my

1
2 fault.

3 THE COURT: You tried to pin it on a new law
4 clerk. I was in the Court of Appeals on Friday
5 afternoon on a command performance for the twenty-fifth
6 anniversary of Irving Kaufman and you picked that
7 time to adjourn a case which --

8 MR. WEISS: I believe your recollection is not
9 correct. I spoke to your law clerk two weeks previous.
10 I spoke to him again on Tuesday and I told him I
11 thought--

12 THE COURT: I wouldn't have spent Saturday
13 morning getting ready for this case if I hadn't
14 assumed it was going to trial.

15 MR. WEISS: I spoke two weeks previous,
16 Tuesday previous, and I believe Thursday and Friday.

17 THE COURT: Don't you take a law journal in
18 your office?

19 MR. WEISS: I receive a law journal in the
20 morning and I received this morning after I received
21 the phone call. I did not receive it on Friday. I
22 talked to your law clerk. I am not trying to pin
23 anything on him. He's been cooperative and helpful.
24 I have never in my life missed a court appointment,
25 approximately eleven years. I entered this case,

1 your Honor, two years ago, in order to help Civil
2 Liberties Union to bring it to a quick close. I
3 never asked for an adjournment in this case. I was
4 ready to go to trial, if your Honor remembers, in
5 May or June, and your Honor ruled that there had to
6 be a deposition because there may be a phantom client.

7 THE COURT: I gave you three months.

8 MR. WEISS: With a great deal of cooperation
9 to have that deposition, which your Honor thought was
10 essential. My position was no deposition was
11 essential at all. We could have gone to trial May or
12 June. I wanted to try it five months ago and now I
13 have depositions. Your Honor seems to be penalizing
14 me. It doesn't seem to be fair.

15 THE COURT: You may make a motion on written
16 papers in ten days, give me a memorandum as to the
17 necessity of trying the case. In the light of the
18 City's lien --

19 MR. WEISS: I will also give you the following
20 -- I give you my word as a member of the Bar, that
21 my purpose is to achieve concrete active results for
22 my client, and I think I can do that. I think that
23 ought to carry as much weight as the memorandum of
24 law that I'd be glad to give you.

25 THE COURT: I'm sure that you would be

1 interested in submitting some kind of statement on
2 the law on this subject but I am not going to try a
3 case just for that, if there is no practical result
4 from it.

5 MR. WEILER: I could help everyone in this
6 regard. We have held depositions. I don't require
7 them. I would like to bring to the Court's
8 attention and to Mr. Weiss' attention on the record,
9 that he and I have been discussing this. I represent
10 on behalf of the Corporation Counsel, without cost,
11 two doctors, one is Dr. Thomas, the other is Dr. Owens,
12 and I will state and this has been shown and Mr. Weiss
13 can, I believe, confirm this: Dr. Thomas has no
14 connection with this case, because five months after
15 she left the hospital he was first appointed as the
16 director of psychiatric services, and in fact he was
17 not even -- had anything to do with the entire
18 subject matter of her stay. He was doing something
19 else at the hospital, wholly separated from her care.
20 Dr. Owens, the other doctor who is named, had nothing
21 to do with the order or the treatment of her. The
22 only thing he had to do was that on five or seven
23 days after she came to the hospital, he gave her a
24 psychiatric examination and report for treatment at
25 Central Islip Hospital but had nothing to do with

1 9 these alleged medications. Therefore, for the only
2 two doctors whom I represent as the Assistant
3 Corporation Counsel, there is no cause of action
4 against either of them as a factual matter, as has
5 been determined from the depositions. I submit,
6 therefore, that it may assist both Mr. Weiss and
7 your Honor in determining the merits between the
8 State Department of Mental Hygiene and the plaintiff
9 -- because the City is not sued and there is no
10 pending jurisdiction against the City of New York.
11 If the two doctors whom I represent are discontinued
12 out of the case then his entire action would be
13 against the State Department of Mental Hygiene, and
14 the City's lien would become possibly academic, and,
15 therefore, the whole issues that are raised in that
16 thing would drop out of the case.

17 I would like to hear what Mr. Weiss would say
18 in that connection, maybe it would simplify the whole
19 issue.

20 THE COURT: Let Mr. Kantor tell me who he
21 represents.

22 MR. KANTOR: I am from the Attorney General's
23 Office. I represent the State Department in this
24 action, that is Dr. Miller who is the Commissioner
25 of the State Department of Mental Hygiene, and

Dr. O'Neill who was at thatpoint, the Director of the Central Islip State Hospital.

THE COURT: How about Dr. Blankfeld?

MR. KANTOR: I don't believe --

MR. ENNIS: They were not properly served.

THE COURT: There is an answer here from Dr. Blankfeld.

MR. ENNIS: Is there an answer from him?

THE COURT: There is an answer for Dr. Blankfeld by Sol Bernstein from the Corporation Counsel's office.

Do you know the facts about him?

MR. ENNIS: No, I don't, but I could find out in the next few minutes. I have a copy of the hospital record.

MR. KANTOR: It is our belief that there are several legal problems notwithstanding the United States Court of Appeal's opinions.

THE COURT: You said you represent Dr. Miller and Dr. O'Neill?

MR. KANTOR: That's correct.

THE COURT: You also represent Dr. Dromgoole?

MR. KANTOR: No.

THE COURT: Who represents her?

MR. KANTOR: She's never been served, never

1 11 been made a proper party to this action.

2 THE COURT: Let's get the facts when the time
3 comes for motions we'll know where we are.

4 Dr. DaCorta was served and nobody appeared for him.

5 There is a letter dated March 15, 1974 from
6 Joel Sachs to Judge Travia saying this is to inform
7 the Court that the Attorney General of the State of
8 New York hereby appears for Dr. Catherine
9 Dromgoole an employee of the defendant Miller in the
10 instant matter.

11 MR. KANTOR: If that is the case then obviously
12 we appear for Dr. Dromgoole.

13 THE COURT: Let me find out about Dr. DaCorta,
14 also.

15 MR. KANTOR: I believe that he's --

16 THE COURT: He's just described as other
17 doctors on the staff of Bellevue Hospital and
18 Central Islip State Mental Hospital. He was served
19 at 301 East Broadway Fulton, New York on March 5,
20 1974 by a U.S. Marshal serving a copy of the summons
21 and complaint on his wife and no one has appeared
22 for him.

23 MR. KANTOR: I'll check to see whether he
24 is entitled to representation by the Attorney General,
25 if so we'll put in an appearance for him.

1 I would like to address myself to the two
2 major defendants, Dr. Miller and Dr. O'Neill. I
3 believe that there is a question of law outstanding
4 concerning their liability under the official immunity
5 doctrine announced by the Supreme Court in Shorter
6 v. Rose; and further explained by the Second Circuit,
7 a recent case Class against Norton which was decided
8 October 10th. I believe on that ground it may very
9 well be a dismissal as against Drs. Miller and
10 O'Neill in their personal capacity, as they are
11 officials and may well be entitled to official
12 immunity in their official capacity since they are
13 employed by the State of New York. They are immune
14 in that regard.

15 As to the actual doctors administering
16 treatment your Honor we are prepared to go forward
17 with the defense of those defendants. However, I
18 do not want to put Mr. Weiss in a position where
19 he's forced to represent a plaintiff which he's not
20 ready to represent, and I don't think I could add
21 anything more to my comments.

22 THE COURT: If there is a motion to re-open,
23 it should go into the question of what particular
24 defendants are properly -- would properly remain in
25 the case. I might very well, if there is a trial,

1 have to dismiss against Dr. Miller and the doctors
2 whom Mr. Weiler mentioned at the beginning.

3 MR. ENNIS: I do not say the same thing for
4 Dr. Blankfeld. I see that his name appears and it's
5 signed by him on the doctor's order sheet. I would
6 not make the same representation as I did for --

7 THE COURT: We still have the lien?

8 MR. ENNIS: He may have to respond.

9 THE COURT: We have a lot of papers in the
10 file now. We might as well get some more. We'll sort
11 it out and bring it up to date. You still don't
12 want to go ahead this afternoon, Mr. Weiss?

13 MR. WEISS: Your Honor, I can't. As you may
14 very well understand, to prepare somebody like my
15 client for trial, it takes some time and some
16 discussions with her. It took some time and a great
17 deal of cooperation with these attorneys to have the
18 deposition. It would take some time to walk across
19 Cadman Plaza and come here. I couldn't now call her
20 up and say we are picking a jury.

21 THE COURT: All right.

22 MR. WEISS: I'm sorry.

23 THE COURT: We'll see what comes first.

24 MR. WEISS: Thank you very much, your Honor.

25 * * *